

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

QUALCOMM INCORPORATED)

Petition for Declaratory Ruling
Giving Effect to the Mandate of the
District of Columbia Circuit Court
of Appeals)

DA 00-219

Service Rules for the 746-764 and
776-794 MHz Bands, and Revisions
to Part 27 of the Commission's Rules)

WT Docket No. 99-168

ORDER**Adopted: May 25, 2000****Released: June 8, 2000**

By the Commission:

I. INTRODUCTION

1. In this Order, we take action to resolve litigation with Qualcomm Incorporated (Qualcomm) pertaining to the Commission's former pioneer's preference program. Specifically, we grant Qualcomm a transferable Auction Discount Voucher (ADV) in the amount of \$125,273,878 that may be used in any spectrum auction over the next three years, subject to the terms and conditions discussed below. In light of our decision to grant Qualcomm an ADV, we dismiss as moot Qualcomm's Petition for Declaratory Ruling requesting that we satisfy the court mandate by awarding it one of six regional 20 megahertz licenses in the 752-762 MHz and 782-792 MHz bands scheduled for auction later this year.¹

II. BACKGROUND

2. Prior to the early 1990s, the Commission used a system of lotteries and comparative hearings to assign licenses for radio communications services. Because of concerns that innovators might be hesitant to spend the considerable amount of time and money necessary to develop new services without an assurance that they would be granted a license to provide these services, the Commission adopted "pioneer's preference" rules in 1991.² The pioneer's preference program sought to

¹ Qualcomm Incorporated, Petition for Declaratory Ruling Giving Effect to the Mandate of the District of Columbia Circuit Court of Appeals, DA 00-219, filed Jan. 28, 2000 (Qualcomm Petition).

² See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, GEN Docket No. 90-217, *Report and Order*, 6 FCC Rcd 3488, 3489 (para. 6) (1991) (*Pioneer's Preference Order*).

encourage the development of new services and new technologies, by permitting successful applicants to file license applications without being subject to competing applications.³

3. In 1992, Qualcomm applied for a pioneer's preference in the broadband Personal Communications Service (PCS) proceeding, based on its development of Code Division Multiple Access (CDMA) technology for broadband PCS.⁴ In its application, Qualcomm identified southern Florida, specifically Miami and surrounding communities, as its preferred service area.⁵ In a Tentative Decision issued in November 1992 and an Order issued in December 1993, the Commission denied Qualcomm's pioneer's preference application, and granted the applications of American Personal Communications (APC), Cox Enterprises, Inc. (Cox), and Omnipoint Communications, Inc. (Omnipoint).⁶ The Commission declined to grant Qualcomm a preference because it found that Qualcomm's proposed service offering was merely an adaptation of existing technology.⁷ Qualcomm sought, and was denied, reconsideration of the Commission's decision not to grant it a pioneer's preference.⁸

4. In 1995, Qualcomm, along with other parties who were denied pioneer's preferences, petitioned for review of the Commission's decision in the U.S. Court of Appeals for the District of Columbia Circuit.⁹ In the *Freeman* decision, the D.C. Circuit concluded that the Commission had failed to apply its pioneer preference rules consistently to Omnipoint and Qualcomm, two applicants that appeared to be similarly situated. The court vacated the portion of the Commission's decision denying Qualcomm's preference request and remanded the case for further proceedings "to remedy this inconsistency" in the Commission's treatment of Omnipoint's and Qualcomm's applications.¹⁰

5. Following the *Freeman* decision, which issued on January 7, 1997, the Commission

³ *Id.* at 3492 (para. 32).

⁴ See Qualcomm Petition at 2. See also Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Third Report and Order*, 9 FCC Rcd 1337, 1368 (para. 252) (1994) (*Third Report and Order*).

⁵ Qualcomm's pioneer's preference request predated the Commission's adoption of broadband PCS service rules, including the adoption of service territories. Subsequent to Qualcomm's filing of its request, the Commission adopted service territories for broadband PCS based on Major Trading Areas (MTAs), as defined by Rand McNally. Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, 8 FCC Rcd 7700, 7732 (para. 73) (1993). If its original pioneer preference request had been granted, Qualcomm would have been assigned the Miami-Fort Lauderdale MTA and, therefore, we will refer to Qualcomm's initial choice as being for the Miami-Fort Lauderdale MTA. See *Third Report and Order*, 9 FCC Rcd at 1349 (para. 80).

⁶ See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Tentative Decision and Memorandum Opinion and Order*, 7 FCC Rcd 7794, 7797-7804 (paras. 6-23) (1992); see also *Third Report and Order*, 9 FCC Rcd at 1339-48 (paras. 7-74).

⁷ *Third Report and Order*, 9 FCC Rcd at 1369-1370 (para. 266).

⁸ See Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 7805, 7808, 7811 (paras. 14, 35) (1994).

⁹ See *Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997) (*Freeman*).

¹⁰ *Id.* at 180. At the same time, the court denied the petitions for review of four other unsuccessful pioneer's preference applicants. *Id.* at 180-185.

initiated proceedings on remand.¹¹ Before the Commission could issue an order that responded to the remand, Congress acted to advance the sunset date for the Commission's authority to award pioneer's preferences from September 30, 1998 to August 5, 1997.¹² Based on its interpretation that the Balanced Budget Act of 1997 had withdrawn its authority to grant any additional pioneer's preferences, the Commission on September 11, 1997, dismissed all pending preference applications, including Qualcomm's.¹³

6. On October 9, 1997, Qualcomm filed with the D.C. Circuit a motion to enforce the *Freeman* mandate, contending that the Commission's *Dismissal Order* misconstrued the effect of the Balanced Budget Act of 1997. Because the D.C. Circuit had not granted its motion by the October 20, 1997 deadline for filing with the Commission petitions for reconsideration of the *Dismissal Order*, on October 20, 1997 Qualcomm submitted a petition for reconsideration of that order. On November 5, 1997, the D.C. Circuit dismissed the motion on the grounds that Qualcomm had failed to exhaust its administrative remedies.¹⁴ On April 23, 1998, the Commission issued a *Reconsideration Order* denying Qualcomm's petition for reconsideration.¹⁵ Qualcomm then petitioned the D.C. Circuit for review of the Commission's *Dismissal Order* and the *Reconsideration Order*.

7. On July 23, 1999, the D.C. Circuit in *Qualcomm v. FCC* granted Qualcomm's petition and remanded "to the FCC 'forthwith' to grant a pioneer's preference to Qualcomm and to take prompt action to identify a suitable spectrum and award Qualcomm the license for it."¹⁶ In August 1999, the Commission complied with the court's directive to grant Qualcomm a pioneer's preference.¹⁷ Because the spectrum Qualcomm initially requested in its pioneer's preference application had subsequently been auctioned,¹⁸ Commission staff and Qualcomm held several discussions regarding alternative available

¹¹ See "Filing Period Announced for Comments on Qualcomm's Pioneer's Preference Application (GEN Docket No. 90-314)," *Public Notice*, DA 97-351 (rel. Feb. 18, 1997).

¹² See Balanced Budget Act of 1997, Pub.L. No. 105-33, § 3002(a)(1)(F), 111 Stat. 251, 259 (1997) (amending 47 U.S.C. § 309(j)(13)(f)).

¹³ See Dismissal of All Pending Pioneer's Preference Requests, GEN Docket No. 90-314, *Order*, 12 FCC Rcd 14006, 14007 (para. 3) (1997) (*Dismissal Order*).

¹⁴ See *Freeman Engineering Associates, Inc. v. FCC*, No. 94-1779 (D.C. Cir. Nov. 5, 1997) (order denying motion to enforce mandate).

¹⁵ See Dismissal of All Pending Pioneer's Preference Requests, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 13 FCC Rcd 11485, 11493 (para. 19) (1998) (*Reconsideration Order*).

¹⁶ See *Qualcomm Inc. v. FCC*, 181 F.3d 1370, 1381 (D.C. Cir. 1999) (*Qualcomm*). See also *id.* at 1376 (directing the Commission "to identify and award an appropriate license to [Qualcomm], commensurate with the spectrum it had requested in its [pioneer's preference] application").

¹⁷ See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Order*, 14 FCC Rcd 13678 (1999).

¹⁸ The Miami-Fort Lauderdale MTA spectrum Qualcomm initially requested was won at auction by other entities. The winners of the A and B block broadband PCS licenses in the Miami-Fort Lauderdale, Florida, Major Trading Area (MTA -- M015) were Sprint Spectrum L.P., formerly WirelessCo., L.P., (A block), and PrimeCo Personal Communications, L.P. (B block). See "Ex Parte Status Clarified: Qualcomm Incorporated, Request for a Pioneer's Preference," *Public Notice*, 12 FCC Rcd 2417 (1997).

spectrum,¹⁹ but these meetings failed to produce an agreement as to what spectrum might be suitable to satisfy the court's mandate.

8. On January 28, 2000, Qualcomm filed a Petition for Declaratory Ruling, requesting that the Commission grant it a license for spectrum that has been identified in the 700 MHz proceeding as Block D of the Economic Area Grouping (EAG) 3 service territory, which serves the southeastern United States.²⁰ In support of its petition, Qualcomm also filed a valuation report prepared by PricewaterhouseCoopers that estimated the fair market value of the Miami-Fort Lauderdale MTA to be \$186,000,000 as of December 31, 1999.²¹ Seven parties filed pleadings opposing Qualcomm's petition,²² and one party filed an *ex parte* letter supporting award of a transferable bidding credit, rather than award of any particular license.²³

9. Commission staff held several meetings with Qualcomm following the filing of its petition, and discussed the award of alternative spectrum, specifically certain C-block broadband PCS licenses.²⁴ Commission staff and Qualcomm were unable, through these discussions, to reach agreement with respect to "suitable spectrum" that would satisfy the court's mandate. In view of this impasse, Commission staff and Qualcomm discussed, and reached agreement on, an alternative method of satisfying the court's mandate. The agreement contemplated that in lieu of granting Qualcomm a specific license, the Commission would award Qualcomm a transferable Auction Discount Voucher (ADV) that, under certain agreed upon terms and conditions, Qualcomm could use to obtain a license of its own choosing, in forthcoming spectrum auctions including the upcoming 700 MHz auction.²⁵

¹⁹ See Qualcomm Petition at 7.

²⁰ Qualcomm Petition at 2. See 47 C.F.R. §§ 27.5, 27.6, as amended by Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, FCC 00-5, at paras. 56-61 and Appendix C (rel. Jan. 7, 2000). In this spectrum band, the Block D license is a 20 megahertz license, composed of two paired channels of 10 megahertz each at 752-762 MHz and 782-792 MHz, respectively. Both Block D licenses and Block C licenses, which are 10 megahertz licenses composed of two paired channels of five megahertz each at 747-752 MHz and 777-782 MHz, are scheduled to be auctioned on September 6, 2000. See "Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until September 6, 2000," *Public Notice*, DA 00-942 (rel. May 2, 2000).

²¹ See Qualcomm Petition, Attachment A, "Fair Market Valuation Report: Personal Communications Service Pioneer's Preference License, Qualcomm Inc., As of December 31, 1999," at 42 (PwC Report).

²² The following parties filed comments in response to the Commission's Public Notice seeking comments on the Qualcomm Petition: GTE Service Corporation (GTE); AT&T Corp. (AT&T); Rig Telephones Inc. d/b/a Datacom (Datacom); PSINet Inc (PSINet); SBC Wireless, Inc. (SBC); U S West Wireless, LLC (U S West); and Bell South.

²³ Letter from Richard C. Barth, Vice President and Director, Telecommunications Strategy and Regulation, Motorola, to Magalie Roman Salas, Secretary, FCC, dated Mar. 24, 2000, at 2.

²⁴ Specifically, discussions centered on the possible award to Qualcomm of a group of cancelled NextWave C-block broadband PCS licenses for certain Basic Trading Areas (BTAs) in the Boston area. See Letter from Veronica M. Ahern, Attorney for Qualcomm Inc., to Magalie R. Salas, Secretary, FCC, dated Mar. 14, 2000, at 2 and Attachment. See also Letters from Veronica M. Ahern, Nixon Peabody, L.L.P., to Magalie R. Salas, Secretary, FCC, dated Apr. 7 and Apr. 11, 2000.

²⁵ See Letter from James D. Schlichting, Deputy Chief, Wireless Telecommunications Bureau, to Veronica M. Ahern, Attorney for Qualcomm Inc., and Kevin Kelley, Senior Vice President, External Affairs, Qualcomm (continued....)

III. DISCUSSION

10. We hereby grant Qualcomm a transferable ADV that may be used in Commission spectrum auctions, subject to certain terms and conditions set forth below. Further, we dismiss as moot Qualcomm's Petition for Declaratory Ruling, based on Qualcomm's agreement to accept the ADV in full satisfaction of the court's mandate.²⁶

A. Legal Authority to Award an Auction Discount Voucher (ADV)

11. We conclude that we have the authority to resolve this litigation by awarding Qualcomm an ADV. Section 402(h) of the Communications Act requires the Commission, upon remand from a court, to "carry out the judgment of the court," and in so doing "to forthwith give effect" to the court's judgment.²⁷ Indeed, in its remand of Qualcomm's pioneer's preference application, the D.C. Circuit made specific reference to Section 402(h).²⁸ We are required, therefore, by both the court's order and Section 402(h) to give effect promptly to the court's mandate. Both Section 402(h) and the court's order provide the authority necessary to take this action.

12. The heart of the D.C. Circuit's opinion was its conclusion that we misunderstood the effect of the 1997 amendments to Section 309(j)(13). In the court's words, "the FCC mistakenly conflated the sunset of its authority to issue new pioneer's preferences and its continuing obligation under the mandate in *Freeman Engineering*."²⁹ The court held that "the sunset provision can reasonably be read not to bar relief for Qualcomm, and it should be so read to avoid imputing to Congress the rare intent to undo a final judicial mandate and the constitutional questions that such an intent would raise."³⁰ The court recognized that, under Section 309(j)(13) as amended, "pioneers pay for part of the value of the spectrum they receive[.]".³¹ In addition, it understood "that the Miami-Fort Lauderdale MTA sought by Qualcomm had been awarded as a result of an auction to Sprint," and that the Commission therefore should "fashion an appropriate remedy" rather than award the license originally requested by Qualcomm.³²

13. We accordingly view our task at this point as putting Qualcomm in a position as equivalent as possible to that it would have been in had the Commission awarded it a pioneer's preference in 1993. Thus, we are enabling Qualcomm to obtain the current equivalent of the Miami-Fort Lauderdale MTA license for a cost equivalent to what it would have paid, had its pioneer's preference application been granted. If Qualcomm had been awarded a broadband PCS pioneer's preference at that time, then pursuant to Section 309(j)(13)(E) it ultimately would have received the Miami-Fort
(Continued from previous page)

Inc., dated Apr. 18, 2000; Letter from Veronica M. Ahern, Nixon Peabody, LLP, to James D. Schlichting, Deputy Chief, Wireless Telecommunications Bureau, dated Apr. 18, 2000 (Qualcomm April 18 *ex parte* Letter).

²⁶ See Qualcomm April 18 *ex parte* Letter.

²⁷ 47 U.S.C. § 402(h).

²⁸ *Qualcomm*, 181 F.3d at 1374 and n.2.

²⁹ *Id.* at 1378.

³⁰ *Id.* at 1380 (footnotes omitted).

³¹ *Id.* at 1381.

³² *Id.* at 1376.

Lauderdale MTA license at a discount rather than for free. Qualcomm does not dispute the conclusion that it is entitled to a discount rather than a free license.³³ However, it is not possible to apply the precise terms of Section 309(j)(13) because that statutory provision directed us to grant the licenses “awarded pursuant to the preferential treatment . . . in the Third Report and Order” without altering the “service areas designated for such license in such Third Report and Order,”³⁴ and the *Third Report and Order* denied Qualcomm’s pioneer’s preference request. Moreover, Qualcomm no longer seeks the Miami-Fort Lauderdale MTA license, and the court of appeals recognized, as do we, that it would not be sensible to revoke that license from Sprint and award it to Qualcomm at this late date. But Section 309(j)(13)(E) as amended clearly instructs us to award discounts to those parties who qualified as pioneers. In addition, the court of appeals instructed us to “fashion an appropriate remedy” for Qualcomm, and Section 402(h) authorizes the Commission to “carry out the judgment of the court.”

14. Thus, we have the power and the duty to treat Qualcomm as if it had been awarded a pioneer’s preference in 1993. Had it received a preference at that time, like APC, Cox, and Omnipoint, Qualcomm ultimately would have received a license at a substantial discount. Moreover, had it continued to hold the license, it would be the “owner” of the equity resulting from the increase in the value of the license over the past six years.

15. In addition, Section 4(i) grants the Commission broad authority to take any and all actions necessary to carry out its duties under the Communications Act – including its duties under Sections 309(j)(13)(E), 402(h) and the court’s mandate – as long as those actions are not inconsistent with the Act.³⁵ Section 4(i) specifically provides that “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”³⁶ While the Communications Act does not specifically authorize the issuance of an ADV, neither does it specifically prohibit the Commission from taking this action.³⁷ The D.C. Circuit has previously upheld the Commission’s reliance on Section 4(i) to justify the imposition of a type of remedy for which there was no separate, specific statutory authorization.³⁸ In this case, we find that resolution of the litigation resulting in the satisfaction of the D.C. Circuit’s *Qualcomm* mandate is a matter well within the boundaries of the Communications Act.

16. More generally, courts have recognized that administrative agencies have broad

³³ See Qualcomm Petition at 16.

³⁴ 47 U.S.C. § 309(j)(13)(E).

³⁵ See *New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987).

³⁶ 47 U.S.C. § 154(i).

³⁷ In fact, the ADV is structured to operate in a manner similar to a bidding credit. See discussion *infra* at III.C. The Communications Act expressly authorizes bidding credits. See 47 U.S.C. § 309(j)(4)(D).

³⁸ See *New England Telephone*, 826 F.2d at 1107 (“We find this wide-ranging source of authority adequately supports the Commission’s remedial action”); see also *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 443-44 (5th Cir. 1999), *petitions for cert. pending*; *Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1406 (D.C. Cir.), *cert. denied*, 519 U.S. 823 (1996); *North American Telecommunications Association v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985) (Section 4(i) “empowers the Commission to deal with the unforeseen – even if that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to effectively regulate those matters already within the boundaries.”).

discretion in fashioning remedies.³⁹ This is particularly true when an agency is responding to a judicial remand. Courts have found that an agency can give effect to a judicial decision by taking action that it could not otherwise take under normal circumstances. For example, in *United Gas Improvement Co. v. Callery Properties, Inc.*,⁴⁰ the Supreme Court held that the Federal Power Commission could permissibly order refunds in response to a judicial decision overturning a rate order. Although the Court acknowledged that it had earlier interpreted the Commission's authorizing statute to authorize only prospective rate adjustments, it ruled that the Commission was "not so restricted where its [rate] order . . . has been overturned by a reviewing court."⁴¹ In that circumstance, the Court held that the Commission had authority to order refunds in order to give effect to the judicial decision invalidating its previous order: "An agency, like a court, can undo what is wrongfully done by virtue of its order."⁴²

17. The D.C. Circuit has construed *Callery* to authorize retroactive rate increases as well as refunds.⁴³ While acknowledging that the authorizing statute for the Federal Energy Regulatory Commission (FERC) did not expressly authorize retroactive surcharges, the court concluded that FERC could impose such surcharges in response to a judicial decision invalidating a previous rate.⁴⁴ Specifically, the court recognized that if an agency lacked such broad "corrective power, . . . judicial protection might be a virtual nullity."⁴⁵

18. As these cases demonstrate, agencies have particularly broad discretion to take action that will give effect to a court mandate and resolve adverse litigation. Specifically, agencies have the authority to take action that is not expressly authorized by statute in order to ensure that parties injured by the judicially invalidated order receive adequate relief. In our judgment, and in view of the submissions filed by Qualcomm, the award of an ADV to Qualcomm falls within the remedial authority contemplated by these cases.

19. The D.C. Circuit's decision requires the Commission "forthwith" to . . . identify a suitable spectrum and award Qualcomm the license for it."⁴⁶ While specifying that the spectrum be "commensurate with the spectrum [Qualcomm] had requested in its [pioneer's preference] application,"⁴⁷ the court did not mandate award of any specific spectrum, leaving that decision to the Commission's expert discretion. The court itself acknowledged at oral argument that fashioning a remedy in the present

³⁹ E.g., *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("we observe that the breadth of agency discretion is, if anything, at zenith when . . . fashioning . . . remedies"); see also *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 857 (D.C. Cir. 1970).

⁴⁰ 382 U.S. 223 (1965) (*Callery*).

⁴¹ *Id.* at 229 (citing *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 389 (1959)).

⁴² *Id.*

⁴³ See *Public Utilities Commission of California v. FERC*, 988 F.2d 154, 162-63 (D.C. Cir. 1993) (*CPUC*); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073-75 (D.C. Cir. 1992) (*Natural Gas Clearinghouse*).

⁴⁴ *CPUC*, 988 F.2d at 162; *Natural Gas Clearinghouse*, 965 F.2d at 1073.

⁴⁵ *Natural Gas Clearinghouse*, 965 F.2d at 1074-75.

⁴⁶ *Qualcomm*, 181 F.3d at 1381.

⁴⁷ *Id.* at 1376.

case would be difficult.⁴⁸ Because it has, in fact, proven impossible for Commission staff and Qualcomm to reach an agreement on suitable spectrum to satisfy the court's mandate, we conclude that an ADV appears to provide the only mutually agreeable means of satisfying the court's mandate "forthwith." Although the ADV is not itself a license, it will facilitate Qualcomm's ability to acquire a license or licenses for spectrum that it values most highly. Moreover, grant of the ADV means that Qualcomm itself will have the flexibility to select this spectrum through Commission spectrum auctions held during the next three years, including the 700 MHz auction. This freedom of choice is similar to the pioneer's preference application process, which permitted the applicant to designate the area where it wished to receive a license.⁴⁹

B. Calculation of the Amount of the ADV

20. We conclude that the amount of the ADV should be calculated with the goal of enabling Qualcomm to obtain spectrum "commensurate" with that identified in its pioneer's preference application, for a cost equivalent to what it would have paid had its application been granted. As explained in this section, we find that an ADV in the amount of \$125,273,878 appropriately meets this goal. This amount is equal to a PricewaterhouseCoopers (PwC) estimate of the current value of the Miami-Fort Lauderdale MTA license, minus the amount that Qualcomm would have paid for the direct award of that license in 1994, adjusted to account for favorable payment terms that Qualcomm would have received as a pioneer.

21. With respect to the current value of the Miami-Fort Lauderdale MTA license, Qualcomm provided in support of its petition a valuation report by PwC that estimates this value to be \$30.00 per capita, or \$186,000,000.⁵⁰ The PwC estimate is for the "bare" or unbuilt license.⁵¹ Based on our own analyses, we conclude that it is reasonable to use this \$186,000,000 figure as the current value for the Miami-Fort Lauderdale MTA license for purposes of calculating the amount of the ADV.

22. The amounts paid by the other broadband PCS pioneers for their licenses were determined according to a statutory formula. Section 309(j)(13) of the Communications Act sets forth both a general payment structure for pioneer's preferences⁵² and a payment structure that applied

⁴⁸ In its petition, Qualcomm quotes the court as stating at oral argument: "[n]ow, there is a difficult problem here as to whether or not a remedy can be found. I'm sympathetic on that one. That's hard." Qualcomm Petition at 6 (quoting transcript of oral argument).

⁴⁹ See *Pioneer's Preference Order*, 6 FCC Rcd at 3495 (para. 53).

⁵⁰ PwC Report at 42.

⁵¹ See Qualcomm Petition at 10.

⁵² 47 U.S.C. § 309(j)(13)(B), which states: "The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay such sum determined by —

- (i) identify the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions and other technical characteristics to the license awarded to such person, and excluding license that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;
- (ii) dividing each winning bid by the population of its service area (hereinafter referred to as the "per capita bid amount);

(continued....)

specifically to the broadband PCS pioneer's preference licensees.⁵³ In accordance with the statutory formula, which required that the other broadband PCS pioneers pay a per capita amount 15 percent less than the average per capita amount paid by winning bidders in the 20 largest markets excluding the pioneers' markets of New York, Los Angeles, and Washington, the other pioneers paid \$13.16 per capita.⁵⁴

23. Had Qualcomm obtained a pioneer's preference for the Miami-Fort Lauderdale MTA license in 1994, under the specific terms of Section 309(j)(13)(E)(iii), this licensing area would have been excluded from the Commission's calculation of average per capita bid amounts. The next largest MTA, serving the Seattle area, would have replaced Miami for the purposes of making this calculation.⁵⁵ With this adjustment, Qualcomm would have paid a per capita amount of approximately \$13.27, or \$68,144,164 for the Miami-Fort Lauderdale MTA license.⁵⁶

24. In addition, the statute provided favorable payment terms to the broadband PCS pioneers, permitting them to make guaranteed installment payments over a period of five years. During the first two years, the pioneers were required to pay only for interest on unpaid balances, and then to make payments for the unpaid balance and the interest thereon in the following three years.⁵⁷ The Commission determined that the pioneers were to pay an interest rate equal to 7.75%.⁵⁸

25. We conclude that it is reasonable to adjust the \$68,144,164 amount that Qualcomm would have paid for the Miami-Fort Lauderdale MTA license to account for the favorable five year installment payment terms Qualcomm would have received as a pioneer. We further conclude that a

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- (iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);
- (iv) reduce such average amount by 15 percent; and
- (v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person."

⁵³ 47 U.S.C. § 309(j)(13)(E)(iii), which requires the Commission to use, as the most reasonably comparable licenses for the purposes of 47 U.S.C. § 309(j)(13)(B)(i), "the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment."

⁵⁴ American Personal Communications, Washington-Baltimore MTA #10, Frequency Block A, File No. 15000-CW-L-94, Call Sign: KNLF200; Cox Cable Communications, Inc., Los Angeles-San Diego MTA #2, Frequency Block A, File No. 15001-CW-L-94, Call Sign: KNLF201; Omnipoint Communications, Inc., New York MTA #1, Frequency Block A, File No. 15002-CW-L-94, Call Sign: KNLF202; For Initial Authorizations in the Broadband Personal Communications Service, *Order*, 11 FCC Rcd 12384, 12386 (para. 4) (1996) (*Payment Order*).

⁵⁵ See Rand McNally 1992 Commercial Atlas and Marketing Guide. See also "Commercial Mobile Radio Service Information: Announcing The Winning Bidders In the FCC's Auction Of 99 Licenses To Provide Broadband PCS In Major Trading Areas; Downpayments Due March 20, 1995," *Public Notice*, at Attachment A (rel. Mar. 13, 1995) (listing winning bids for the Seattle "A" and "B" Blocks).

⁵⁶ The 1990 Miami-Fort Lauderdale MTA population was 5,136,581. Multiplying this figure by the per capita amount (carried to six decimal places) of \$13.266444 produces \$68,144,164.

⁵⁷ 47 U.S.C. § 309(j)(13)(E)(iv).

⁵⁸ *Payment Order*, 11 FCC Rcd at 12390 (para. 11).

reasonable method for making this adjustment is to discount the cash flows to the Commission that would have resulted from Qualcomm's installment payments for the Miami-Fort Lauderdale MTA license at a market discount rate of 11.5%.⁵⁹ The resulting cost to Qualcomm as of the start of the five year period of the payments that it would have made to the Commission for the Miami-Fort Lauderdale MTA license is equal to \$60,726,122.

26. When this adjusted value of the payments that Qualcomm would have made for the Miami-Fort Lauderdale MTA is subtracted from the current value of the unbuilt Miami-Fort Lauderdale MTA license, an ADV in the resulting amount would allow Qualcomm to obtain the current equivalent of the Miami-Fort Lauderdale MTA license for what it would have paid, had its original pioneer's preference application been granted. Therefore, we find that a reasonable amount for the ADV is \$186,000,000 minus \$60,726,122, or \$125,273,878.

C. Terms and Conditions of Use for the ADV

27. In this section of the Order, we establish the terms and conditions for use of the ADV. Qualcomm, or any transferee, may only use the ADV subject to the terms and conditions outlined below.

28. *Substantial Use of Technology:* Consistent with the Commission's pioneer's preference regulations, Qualcomm and its transferees must use the ADV to build a system "that substantially uses the design and technologies upon which [Qualcomm's] preference is based."⁶⁰ As Qualcomm's pioneer's preference application was based on development of Code Division Multiple Access (CDMA) technology for broadband PCS, the ADV shall be used for further development and application of CDMA-based technology.

29. *Time Limit for Use of the ADV:* Qualcomm may use the ADV in any spectrum auction over the course of the next three years. Specifically, Qualcomm may use the ADV in any auction in which FCC Form 175's have been accepted for three years from the effective date of this Order.

30. *Divisibility of the ADV:* Qualcomm may use the ADV either in whole or in part, and may use portions of the ADV in more than one auction or in conjunction with more than one license.

31. *Transferability of the ADV:* Qualcomm may transfer part or all of the ADV to a third party, for example, to a high bidder in a spectrum auction, in exchange for consideration determined by Qualcomm and the transferee. Qualcomm need not be a participant in any auction in order to transfer the ADV. All of the terms and conditions applicable to Qualcomm's use of the ADV shall apply equally to its use by a transferee, except that a transferee may not transfer the ADV to another entity.

32. *Use of the ADV:* The ADV shall only be used to adjust a winning bid, and thus will only affect calculation of a related downpayment or final payment. The ADV may not be used for an upfront

⁵⁹ Qualcomm's five year stream of payments would have been certain, but not without some risk (i.e., the risk that Qualcomm might not be able to make payment at some point in the future). For this reason, we find it appropriate to use a discount rate that is less than the firm's average cost of capital, which we estimate would have been between 14% and 16% during this time period, but more than the no-risk interest rate of 7.75% that Qualcomm would have paid to the Commission. In our view, the appropriate discount rate in this circumstance is the interest rate that would apply to corporate debt, i.e., rates on corporate bonds offered by Qualcomm or similarly situated firms. We believe that 11.5% is a reasonable estimate of this market cost of debt at the time the payment stream would have begun.

⁶⁰ *Third Report and Order*, 9 FCC Rcd at 1339 (para. 8).

payment,⁶¹ nor for withdrawal or default payments that may be incurred during the auctions process.⁶²

33. *Application of Commission's Auctions Procedures:* In using the ADV, Qualcomm and its transferee shall be subject to the Commission's general auctions procedures.⁶³ These requirements include, but are not limited to, the short form disclosure and anti-collusion rules⁶⁴ and the ownership disclosure requirements.⁶⁵ Qualcomm and its transferee shall also be subject to service-specific rules applicable to individual auctions in which the ADV may be used.

34. *Notification of Intent to Use the ADV:* Under ordinary procedures, following the close of an auction, the Wireless Telecommunications Bureau (Bureau) issues a Public Notice announcing the winning bids. Long form applications and down payments are due ten (10) days after the Public Notice issues.⁶⁶ Following receipt of long forms and down payments, the Bureau issues a Public Notice announcing the long forms that have been accepted for filing, and specifying the deadline for filing of petitions to deny.⁶⁷ The Bureau then reviews and addresses petitions to deny, if any are filed. Following this, the Bureau issues a Public Notice that announces that it is ready to grant licenses.⁶⁸ This "ready to grant" Public Notice states the final amount that must be paid in order for the Commission to grant the license, which is the amount the Commission must report to the Treasury as federal revenue from the license.

35. It is the responsibility of Qualcomm or its transferee to notify the Commission of its intent to use the ADV (and the amount of the ADV it intends to use) sufficiently before issuance of the "ready to grant" Public Notice so that use of the ADV can be reflected in the amount reported to the Treasury.⁶⁹ The Commission will apply the ADV amount in a manner similar to a bidding credit, by computing an adjusted net bid amount. Qualcomm or its transferee shall then pay the adjusted net bid amount, less downpayment, to the government in cash in order to obtain the license in question.

36. If Qualcomm or its transferee wishes to have its downpayment calculated based on the adjusted net bid (the bid amount minus the ADV amount to be applied), it must notify the Commission of its intent to use the ADV *before* the downpayment is due. If such notification is not made before the downpayment is due, Qualcomm or its transferee shall pay the full downpayment based on its gross high bid amount. In no event will the Commission reimburse Qualcomm or its transferee for any "overpayment" of a downpayment amount.

⁶¹ See 47 C.F.R. § 1.2106.

⁶² See 47 C.F.R. §§ 1.2104(g)(1),(2).

⁶³ See Part 1 of the Commission's Rules, Subpart Q, Competitive Bidding Proceedings, 47 C.F.R. § 1.2101 *et seq.*

⁶⁴ 47 C.F.R. § 1.2105.

⁶⁵ 47 C.F.R. § 1.2112.

⁶⁶ 47 C.F.R. § 1.2107.

⁶⁷ See 47 C.F.R. § 1.2108(b).

⁶⁸ See 47 C.F.R. § 1.2109(a).

⁶⁹ Commission staff will provide further guidance regarding notification procedures.

IV. CONCLUSION

37. In view of the D.C. Circuit's mandate that the Commission "'forthwith' . . . identify a suitable spectrum and award Qualcomm the license for it," and our subsequent inability to reach agreement with Qualcomm regarding which specific, available license or licenses would constitute "suitable spectrum" for the purposes of satisfying the court's mandate, we conclude that granting a transferable ADV to Qualcomm is a reasonable alternative remedy for the foregone pioneer's preference license. Qualcomm concurs in this view. We therefore grant such an ADV, subject to the terms and conditions set forth in this Order. In view of Qualcomm's documented willingness to accept the ADV in place of the 700 MHz license requested in its Petition for Declaratory Ruling, we dismiss that petition as moot.

V. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED that these actions ARE TAKEN pursuant to Sections 1, 4(i), 303(r), 309(j), and 402(h) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 309(j), and 402(h).

39. IT IS FURTHER ORDERED that Qualcomm is hereby awarded a transferable Auction Discount Voucher (ADV) in full satisfaction of the mandate of the court in *Qualcomm v. FCC*, 181 F.3d 1370 (D.C. Cir. 1999).

40. IT IS FURTHER ORDERED that the ADV may be used in any Commission spectrum auction in which FCC Form 175's have been accepted within three years from the effective date of this Order, subject to the terms and conditions set forth in this Order.

41. IT IS FURTHER ORDERED that the Petition for Declaratory Ruling of Qualcomm Incorporated is DISMISSED AS MOOT.

42. IT IS FURTHER ORDERED that this Order shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Magalie Roman Salas *WFC*
Secretary